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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

A. ROBERT KLEINER, ROSIE BOARD, FRANCIS BROUILLETE AND ERMA LURVEY, Democratic Members of the Michigan Commission on Legislative Apportionment,

Appellants,

v.

RICHARD SANDERSON, CLARE DANIELS, JOHN PAYANT AND LOU ANN TAYLOR, Republican Members of the Michigan Commission on Legislative Apportionment,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. Whether the Supreme Court of Michigan, in adopting a redistricting plan for the Michigan Legislature, may permit divergences from strict population equality that are based on legitimate considerations incident to the effectuation of a rational state policy.

II. Whether the Supreme Court of Michigan, in adopting a redistricting plan for the Michigan Legislature, properly determined state policy and balanced that policy with the federal requirement of population equality.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States are set forth in Appellants' Jurisdictional Statement at page 2. The pertinent provisions of the Michigan Constitution are set forth in the Appendix to the Jurisdictional Statement at pages 264a-278a.

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Appellees.

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MOTION TO DISMISS OR AFFIRM

The Appellees in the above-entitled case move the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Michigan approving a redistricting plan for the Michigan State Legislature. This motion is made on the ground that this appeal presents no substantial federal question that merits the exercise of this Court's plenary

jurisdiction or, in the alternative, that the Supreme Court of Michigan rested its judgment below on adequate and independent state grounds and, that in either event, the appeal merits no further briefs or argument.

STATEMENT OF THE CASE

The Michigan Constitution of 1963, in Article 4 thereof, established certain guidelines for the periodic redistricting of the Michigan Legislature. It also established an apportionment commission charged with the responsibility of carrying out the redistricting task subject to those guidelines.[1] The apportionment commission was constituted in such a way that, as a practical matter, it was comprised of four members appointed by the Republican Party and four members appointed by the Democratic Party, with the Supreme Court of Michigan designated as the final arbiter in the event of a deadlock.

In 1982, as in years past, the commission deadlocked and, pursuant to the provisions of the Michigan Constitution, its members submitted competing plans to the Supreme Court of Michigan with the expectation that the court would select a plan from among those submitted to it. However, before considering the specific plans submitted, the court determined that it was necessary to review the entire redistricting procedure and the role of the court in that procedure.

The court found that certain weighted land area/population formulae established in the Constitution and a criterion which permitted a population variance of 75-125% from absolute equality had been invalidated by this Court's holding in *Reynolds v. Sims*, 377 U.S.

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[1] Michigan Constitution 1963, Art. 4, §§2-6.

533 (1964). The question, then, was whether the remaining constitutional provisions were viable. The court specifically held that the remaining criteria were not only constitutionally valid, but historically established. However, notwithstanding that determination, the court found that the valid criteria and the procedural mechanism of redistricting were so inextricably interwoven with the invalid criteria as to make the entire scheme nondivisible.[2] Accordingly, the court struck all of the provisions of Article 4, §§ 2-6, from the Michigan Constitution, and did not reach the necessity of having to choose a plan from among those submitted to it by the members of the apportionment commission.

Faced with an obviously malapportioned state legislature, with the imminence of the 1982 elections, and with no constitutional body charged with redistricting responsibility, the court invited the Michigan Legislature to reapportion itself by statute, subject to the governor's approval, in accordance with federal and state constitutional principles. *In re Apportionment of State Legislature–1982*, 413 Mich. 96, 142 (1982). In order to insure orderly elections, a deadline of no later than four weeks prior to the filing deadline for the August primary election was established for legislative action. In the event that the legislature did not act, the court determined that, as a last resort, it would be required to adopt a redistricting plan. To that end, the court appointed a special master to prepare a redistricting plan for the state in accordance with the federal principle of population equality and in accordance with specific state policies, which the court painstakingly researched and which were set forth at length in the court's opinion.

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[2] *In re Apportionment of State Legislature–1982*, 413 Mich. 96, 139 (1982).

The legislature failed to act; the Michigan Supreme Court had no choice but to put a new redistricting plan into effect. The plan adopted by the court (hereinafter termed the Apol Plan) departed from absolute population equality only to the extent necessary to preserve the historically established state policies of preserving county lines, to preserve city and township lines, and to preserve compactness in all districts. Care was taken not to exceed the maximum percentage deviation in state reapportionment plans permitted by this Court to date. While unfettered adherence to the articulated state policies would have resulted in maximum population divergences far in excess of permissible limits, restraints imposed pursuant to federal law resulted in maximum population divergences under the Apol Plan of 16.26% in the Senate and 16.36% in the House of Representatives.

On May 21, 1982, the court denied Appellants' application for rehearing and entered an order implementing the Apol Plan. It is from that order that this appeal is taken.

SUMMARY OF ARGUMENT

Appellants dispute the conclusion below that the Equal Protection Clause of the Fourteenth Amendment permits a state court to harmonize the federal principle of population equality with substantiated, rational state policy. However, *Reynolds v. Sims*, 377 U.S. 533 (1964), directs a state to make a good faith effort to construct districts for both houses of its legislature as nearly of equal population as is practicable, recognizing that divergence from true population equality can be justified by the necessity to effectuate rational state policy. *Id.* at 579.

Appellants contend that this long-standing rule has been changed and is now applied differently depending upon the entity charged with redistricting responsibility. Apparently, Appellants would argue that a state legislature is accorded one level of latitude in harmonizing state policy, *see Mahan v. Howell*, 410 U.S. 315 (1973), while a state's highest court is afforded a reduced latitude. This somewhat startling proposition is said to be required by the Equal Protection Clause of the Fourteenth Amendment as determined by this Court in the cases of *Chapman v. Meier*, 420 U.S. 1 (1975), and *Connor v. Finch*, 431 U.S. 407 (1977).

Those cases do not support Appellants' position. *Chapman* and *Connor* both involved federal district courts that were attempting to define and apply state policy to state legislative redistricting. This Court did not disapprove of harmonizing state policy. Rather, the Court stated that the lower courts' determinations of state policy were defective and that in the absence of a valid determination of state policy, the federal courts were constrained to adopt plans having little more than *de minimus* population variances. In this case there was a valid and controlling determination of state policy.

The Appellants next argue that, even if the rule is stated correctly, it was not applied correctly. It is the position of the Appellees that under the circumstances present in this case, that is, there being no constitutional body charged with redistricting responsibility, and the legislature having failed to act, the Supreme Court of Michigan had not only the power to take such action as was necessary to provide for constitutional elections in 1982, but the duty and responsibility to do so. The court was the only available state body which could act, and it did so.

Appellants criticize the Michigan court's determination of state policy. In their Jurisdictional Statement, Appellants assert that the court, in striking the procedural provisions relative to redistricting, also declared the substantive redistricting criteria invalid. The assertion is disingenuous since even the most cursory review of the court's opinion will reveal exactly the contrary. The court conducted a very careful review of Michigan's history and made very specific findings relative to state policy. In any event, the court's determination of state policy was based upon adequate and independent state grounds. Determination of state policy by a state court does not involve a federal question and therefore consideration of that issue should be dismissed by this Court without further review. *Hale v. Akers*, 132 U.S. 554 (1889).

Appellants next accuse the Michigan court of substituting the preservation of political subdivisions for the federal requirement of population equality as the primary criterion for reapportionment. That is not the case. On the contrary, the court considered population paramount and determined that it was "justified in adopting only that degree of divergence from population equality essential to achieve the state goals."[3] Further, the court recognized that when the requirements of state policy and the requirements of equal population became

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[3] An apportioning authority is justified in adopting only that degree of divergence from population equality essential to achieve the state goals. Once achieved, the flexibility is at an end. Accordingly, divergence from the federal goal of population equality is permitted only to the extent necessary to permit achievement of the state goals of observing the boundary lines of local units of government and compactness.

In re Apportionment of State Legislature, 413 Mich. at 127.

irreconcilable, state policy must yield. Thus, the court clearly considered population the primary criterion.

Finally, Appellants claim that the court converted *Mahan* into a "prescriptive" rule. To the contrary, the court expressly recognized that valid state policy is entitled to protection of the Michigan courts subject, of course, to federal limits. The court then looked to the decisions of this Court for guidance in determining applicable federal limits. The court recognized that there was no absolute standard,[4] but determined that under the facts of this case, *Mahan v. Howell* defined the parameters of the court's discretion. *In re Apportionment of State Legislature*, 413 Mich. at 128, n.17.

No matter how phrased, the essence of Appellants' claim is that the population divergence allowed by the Michigan court is impermissibly large. This Court has long followed the principle that it will decline jurisdiction if the federal question urged has been settled by previous decisions.[5] Thus, consideration of Appellants'

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[4] We do not read the decisions of the United States Supreme Court as imposing an absolute standard. Its opinions indicate rather that no hard and fast rule was laid down:

> "[T]he fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State." *Swann v. Adams*, 385 U.S. 400, 445 (1967).

In re Apportionment of State Legislature, 413 Mich. at 141, n.26.

[5] The United States Supreme Court has long followed the principle that a federal question may have been so explicitly foreclosed by its prior decisions as to afford no basis for a writ of error from the United States Supreme Court to the state court. *See Leonard v. Vixburg, S. & P. R. Co.*, 198 U.S. 416 (1905). This Court declines jurisdiction if the federal question urged has ceased to be substantial by reason of having been settled by previous decision,

[footnote continued]

principal argument is foreclosed by *Mahan*. That being the case, Appellants are reduced to urging that *Mahan* should be distinguished because a state supreme court is not entitled to apply state policy in the same way as is a state legislature. No support is cited for this somewhat unique proposition and Appellees contend that the issue is so insubstantial as not to merit this Court's plenary review. What the Michigan court did in this case was to determine state policy and then apply that policy in harmony with federal law. This Court has determined that, in a situation such as this case presents, review is not available. *Dower v. Richards*, 151 U.S. 658 (1894).

Thus, it is the position of the Appellees that the issues raised by the Appellants are either not reviewable or have already been decided by this Court. Accordingly, Appellees respectfully move the Court to dismiss the appeal or, in the alternative, to affirm the judgment below without further briefing or oral argument.

Zucht v. King, 260 U.S. 174 (1922); *Heitler v. United States*, 260 U.S. 438 (1923), and this principle adheres even where Appellants claim invasion of a constitutional right, where the question has been settled by previous decisions of the United States Supreme Court, *Utley v. St. Petersburg*, 292 U.S. 106 (1934), and where the state court followed the previous decision or decisions of the United States Supreme Court settling the federal question. *Minneapolis S.P. & S.S.M.R. Co. v. C. L. Merrick Co.*, 254 U.S. 376 (1920).

ARGUMENT

I.

THE SUPREME COURT OF MICHIGAN, IN ADOPTING A REDISTRICTING PLAN FOR THE MICHIGAN LEGISLATURE, MAY PERMIT DIVERGENCES FROM STRICT POPULATION EQUALITY THAT ARE BASED ON LEGITIMATE CONSIDERATIONS INCIDENT TO THE EFFECTUATION OF A RATIONAL STATE POLICY.

Severance of the procedural redistricting provisions from the Michigan Constitution in no way vitiated the power of the state's highest court to announce state redistricting policy or to redistrict Michigan's legislature if the citizens of Michigan or the legislature itself proved unable to do so. This Court has acknowledged the power of a state supreme court, in an unapportioned or malapportioned state, to act to insure that no election suffers constitutional taint. Further, this Court has long recognized that the power of a state judiciary includes not just the power to require valid redistricting, but the power "to formulate a valid redistricting plan" as well (*see Scott v. Germano*, 381 U.S. 407, 409 (1965); *Maryland Committee v. Tawes*, 377 U.S. 656, 676 (1964); *Baker v. Carr*, 369 U.S. 186, 235-236 (1962)), and has applauded the state judiciary's willingness to assume jurisdiction to avert the spectre of invalid elections. *Maryland Committee v. Tawes*, 377 U.S. at 674. While invalidation of the state's procedural redistricting provisions precipitated the crisis below, it did not deprive the court of that essential judicial responsibility. In fact, it is clear that under the circumstances of this case, the court had not only the power but the judicial responsibility to adopt a redistricting plan.

The fundamental principles to be followed in redistricting a state legislature are set forth in *Reynolds v. Sims*.[6] The essence of this Court's holding in *Reynolds*, and in the entire panoply of cases dealing with the redistricting of state legislatures which have been decided by this Court since *Reynolds*, is that the Equal Protection Clause of the Fourteenth Amendment requires that the vote of any citizen must be approximately equal in weight to that of any other citizen in the state. Exact equality is not required, but differences in voting power must be justified as necessary to effectuate considerations of rational state policy. The task, then, which is imposed upon any entity having the responsibility of redistricting a state legislature is to harmonize the requirements of state policy with the federal requirement of population equality, subject to the overriding consideration that where the two requirements come into conflict, the federal requirement must control.

Appellants claim that this fundamental principle has been modified by this Court in the cases of *Chapman v. Meier*, 420 U.S. 1 (1975), and *Connor v. Finch*, 431 U.S.

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[6] [T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.

. . . .

. . . So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

Reynolds v. Sims, 377 U.S. 533, 577, 579 (1964).

407 (1977). Two arguments are advanced: one is to the effect that the latitude afforded the state's highest court in applying state policy is narrower than that afforded a state legislature; the other is that the preservation of political subdivisions is not a rational state policy, the application of which would justify divergence from a strict population standard.

With regard to the first argument, neither *Chapman* nor *Connor* support the position espoused by Appellants. Those cases involved federal district courts attempting to define and apply state policy to the state legislative redistricting process. In both cases this Court determined that the lower courts had not properly defined state policy. In the absence of a proper determination of state policy, harmony was not possible and the lower courts were left with population equality being the only applicable standard.

That situation does not apply here. State policy is not a federal question and a determination of state policy by a federal court is reviewable in this Court only by virtue of this Court's supervisory power over inferior federal courts. Unlike federal courts, which "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name," the Supreme Court of Michigan properly exercised "its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy." *Connor v. Finch*, 431 U.S. at 415. The Michigan court properly determined state policy and that determination is binding on this Court. Therefore, the considerations which led to the holdings in *Chapman* and *Connor* do not apply to this case.

Appellants assert that upholding the decision of the Michigan court will result in races to the state and federal

courthouses with different interpretations of the Fourteenth Amendment applied in each. Appellants need have no fear of such an unseemly result. State policy having now been determined by the Supreme Court of Michigan, such determination becomes binding upon the federal courts and the only problem which would be faced by a federal court in a *Connor* or *Chapman* situation would be to insure that the policy was correctly applied.

If this Court were to adopt Appellants' view, the effect would be a determination that the Equal Protection Clause of the Fourteenth Amendment imposes different requirements on a state's highest court than it does on a state's legislature. In other words, it would require a holding by this Court that a state's action in redistricting its legislature was either discriminatory or not discriminatory based upon whether the action was taken by the state's legislature or by the state's highest court. State action is state action, no matter by whom it is taken. State discrimination is a result, and is not measured by which state agency is responsible for it. Appellants cite no competent authority for this proposition and Appellees submit that the entire proposition is so insubstantial as not to warrant this Court's plenary consideration.

Appellants' second argument is no better. The preservation of political subdivisions was one of the principal state policies recognized in *Reynolds.*[7] The continued

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[7] The United States Supreme Court first recognized that the federal Equal Protection Clause requires both houses of a bicameral state legislature to be apportioned substantially on a population basis in *Reynolds v. Sims*, 377 U.S. 533 (1964). The *Reynolds* Court also perceived that, because as a general rule a greater

[footnote continued]

vitality of that policy was affirmed by this Court in *Mahan*. Appellants' argument in that regard is also so insubstantial as not to require further comment.

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number of state legislative seats than congressional seats must be distributed within a state, it may be feasible for a state apportioning body to utilize political subdivision lines to a greater extent in establishing state legislative districts, while still embracing the federal principle of equality of population among election districts. Furthermore, the *Reynolds* Court articulated a justification for the harmonization of a state goal of preserving political subdivisions and the federal principle of population equality:

> A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.

Reynolds v. Sims, 377 U.S. at 580-581.

That a state might desire to preserve political subdivisions did not appear disingenuous to the *Reynolds* Court, but rather a rational state policy:

> A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.

Reynolds v. Sims, 377 U.S. at 578-579.

II.

THE SUPREME COURT OF MICHIGAN, IN ADOPTING A REDISTRICTING PLAN FOR THE MICHIGAN LEGISLATURE, PROPERLY DETERMINED STATE POLICY AND BALANCED THAT POLICY WITH THE FEDERAL REQUIREMENT OF POPULATION EQUALITY.

A. The Determination of State Policy

In determining whether the Supreme Court of Michigan adequately fulfilled its constitutional responsibilities in the case before this Court, the initial inquiry should concern whether state policy has been adequately determined. At the outset it should be emphasized that we are dealing with a state court determining state policy. For the reasons noted above, such decisions are not usually reviewable by this Court. Nonetheless, the issue has been rasied and must be addressed.

Given that divergences from strict population equality are permitted if necessary to effectuate considerations of rational state policy, Appellants assert that, despite the findings of the Michigan Supreme Court, there are no rational state policies to apply. Such an assertion is unfounded. In fact, the court concluded from a comprehensive review of state history, past and present state constitutions, comments made by delegates to the 1961 Constitutional Convention, and the constitutionally valid provisions in the present state constitution, that the State of Michigan, from the Northwest Ordinance to the present constitution, has adhered to rational state policies of compactness and the preservation of political subdivisions in drawing election districts.

The Court referred to numerous sources in making its determination. It started with Section 9 of the Northwest Ordinance of 1787 which, in setting up a

unicameral legislature for the Michigan Territory, provided that members of the House of Representatives would be elected from counties or townships. Article 4, § 4 of Michigan's first constitution established a bicameral legislature and provided that each organized county would be entitled to at least one representative in the House and that no county should be divided in the formation of Senatorial districts. Article 4, § 2 of the Constitution of 1850 provided that no county would be divided in the formation of Senatorial districts and that no township or city would be divided in the formation of Representative districts. Article 5, § 3 of the Constitution of 1908 and the subsequent amendment of its reapportionment provisions in 1952, reaffirmed the state's policy of preserving counties, townships, and cities as basic units of legislative representation. Finally, Article 4, §§ 2 and 3 of the Constitution of 1963 provided for the county unit as the basic unit of electoral representation in both houses of the Michigan legislature.

Appellants challenge the right of the court to consider the criteria set forth in the Constitution of 1963. It must be emphasized that except for the land-area/population requirements, the redistricting criteria of that Constitution were held invalid not because they were substantively infirm, but because they were an integral part of a redistricting scheme that could not stand absent its invalid parts. *In re Apportionment of State Legislature*, 413 Mich. at 126. Construction of a state constitution and the interpretation of state law is the prerogative of the supreme court within that state. *Reitman v. Mulkey*, 387 U.S. 369, 373-74 (1971). Accordingly, this Court has recognized that invalidating a procedural reapportionment mechanism does not imply the illegality of those criteria which a court specifically finds to be valid. *See, e.g., Chapman v. Meier*, 420 U.S. 1 (1975). Certainly

that is the case here and the court was clearly entitled to consider those provisions of the Constitution of 1963 which were valid.

The court did not rest there, but turned also to the official records of the Constitutional Convention of 1961. The court's careful review of the convention record enabled it to discern the rationale for Michigan's long-lived policy of preserving political subdivisions in state electoral districts:

> The provisions of the 1963 Constitution requiring that election districts be organized along county, city and township lines to the extent possible (i) enable voters living in a particular community to combine their votes more effectively to elect a representative from that area, (ii) facilitate the conduct of the election by reducing the number of precincts and special ballots, (iii) tend to preserve existing political party organizations, and (iv) limit the potential for gerrymandering.

In re Apportionment of State Legislature, 413 Mich. at 133, n.20.

Based upon the foregoing, Appellants' assertion that there was no basis for the court's determination of state policy is somewhat disingenuous.

In any event, there are certainly adequate and independent state grounds upon which to base the court's opinion and this Court has consistently adhered to the principle that it will not review a state court judgment based upon adequate and independent state grounds, even though a federal question is involved and is arguably wrongly decided (*e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 635 (1875)), unless, of course, the federal question is controlling. Thus, any issue raised by

Appellants regarding whether state policy was correctly determined would not merit the plenary consideration of this Court.

B. The Application of State Policy

The court below recognized that, in the presence of clearly substantiated and rational state policies of compactness and the preservation of political subdivisions, a redistricting plan for a state legislature must harmonize the federal principle of population equality with that state policy. However, the court also clearly expressed its understanding from the decisions of this Court that any divergence from population equality must be essential to the effectuation of those state policies and must be achieved with the least cost to the federal principle as possible. Further, the court clearly recognized that when state policies cannot be reconciled with the federal requirement, federal law must prevail.

As the two concurring justices to the May 25, 1982 order expounded, and as the unanimous *per curiam* opinion of March 25, 1982 expressly provided, the federal goal of population equality remains the touchstone of redistricting. However, as a state court charged also with the responsibility of safeguarding state constitutional principles and state policy, the Michigan court believed its duty clear: to preserve state policies to the maximum extent possible consistent with federal law. Of that duty, the court stated:

> It would be a misconstruction of the Equal Protection Clause for this Court . . . to fail to implement a state policy of preserving the boundary lines of local units of government. It is our duty under the Supremacy Clause to fully implement, but not to extend beyond its ambit, the Equal Protection Clause.

In re Apportionment of State Legislature, 413 Mich. at 121.

Thus, it became the task of the court to determine the point at which the requirements of state policy and federal population equality become irreconcilable for it was at that point, but not until that point was reached, that state policy must yield. Although this Court has never defined that specific point, the Michigan court determined that *Mahan v. Howell*, 410 U.S. 315 (1973), while not establishing an outer limit, had at least established a level at which state action had been approved.

Appellants do not contend that the Michigan Court failed to articulate the federal principle; rather, they contend that the court diverged too far from the principle of population equality when it attempted to harmonize the state policy of preserving political subdivisions with the federal requirement. To buttress their contentions, Appellants first attempt to distinguish *Mahan* on the ground that it deals with a state legislature rather than a state court. This issue has been discussed above. Appellants then proceed to seriously mischaracterize the judgment below. First, they characterize the decision as adopting a "prescriptive" rule, the purpose of which was to avoid population equality except where necessary. Second, they suggest that the lower court substituted state policy for the federal principle of population equality as the "primary" standard governing state legislative reapportionment. Neither mischaracterization will withstand scrutiny.

Contrary to Appellants' assertions that the court applied a "prescriptive" rule for the purpose of avoiding equality of population where possible, the Michigan court understood this Court's decisions in *Reynolds* and *Mahan* to stand for the proposition that valid and

rational state policies can be accommodated in redistricting within federally established limits. In taking the course that it did, the court was not attempting to avoid population equality, but rather was seeking to preserve valid state policies to the extent that such protection is federally permissible. Accordingly, the Michigan court realized that strict adherence to the policy of preservation of county lines would cause a maximum population divergence far in excess of that which this Court has previously permitted and recognized that the federal principle must control. The court then observed that the deviation from equality in *Mahan* approached the range of "tolerable limits." Thus, in directing that the population divergence between the new districts not exceed the maximum divergence previously permitted by this Court, the Michigan court adopted the position that although this Court has not imposed a rigid limit on accommodation of state policy, it was unwilling to go beyond what had been approved in *Mahan*. That action does not constitute a "prescriptive" rule. The range of divergences, within the limits, will fall where they may as the state policies are implemented, and state policies are preserved only to the extent possible. Thus, Appellants' first mischaracterization must fail.

Likewise the court did not "substitute" the state policy of preserving political subdivisions for the federal principle of equality of population as the "primary" standard governing the reapportionment of state legislatures. By definition, a primary standard is one which will control when two or more standards are irreconcilable. In this case it is clear that the federal requirement, as enunciated in *Mahan*, was controlling in those situations where preserving a county line would produce a population divergence beyond that approved in *Mahan*.

In taking that position, the Michigan court acknowledged that federal law must control and is thus the primary redistricting standard. Thus, as did its first mischaracterization, Appellants' second mischaracterization must fail.

Appellants also complain that the court did not consider "other population factors." This, of course, is simply not true as reference to Appendix B to the concurring opinion of Justices Levin and Kavanaugh will show. *See In re Apportionment of State Legislature*, 413 Mich. at 206.

In summary, a careful scrutiny of the judgment below reveals not a misreading of this Court's decisions regarding state legislative redistricting, but a thoroughly documented perception that the Equal Protection Clause of the Fourteenth Amendment permits divergences from a standard of population equality only to the extent necessary to effectuate clearly substantiated, rational state policy, and even then only with the least cost to the federal principle. Appellants have failed to establish a single instance in which the Michigan court has failed to act in accordance with that principle or with the prior decisions of this Court. Accordingly, the appeal should be dismissed or the judgment affirmed without further review.

CONCLUSION

For all of the foregoing reasons, the appeal from the judgment of the Supreme Court of Michigan should be dismissed, or, in the alternative, this Court should affirm that judgment without plenary consideration and without further briefs or argument.

Dated: Ann Arbor, Michigan
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Respectfully submitted,

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